Supreme Court, U.S.
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No.

In the Supreme Court of the United States

MICHAEL RICHARDS
Petitioner,

v.

TEXAS A&M UNIVERSITY SYSTEM
AND TEXAS A&M UNIVERSITY,
Respondents.

On Petition For Writ of Certiorari
To The Texas 10th Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Sections 502.002 and 503.002 of the Texas Labor Code make the general protections of the Texas Workers' Compensation Act applicable to employees of the Texas A&M University and University of Texas systems but do not waive the state's sovereign immunity from suit under the anti-retaliation provisions of the Act, which protect employees from retaliation for filing a workers' compensation claim and are applicable to all other public and private employees covered by the Act. Do sections 502.002 and 503.002 of the Texas Labor Code violate the Equal Protection Clause of the United States Constitution by eviscerating the legislatively announced public policy behind the Workers' Compensation Act of providing all Texas state employees with prompt remuneration for their work-related injuries by leaving employees of the Texas A&M University and University of Texas systems unprotected from retaliation for filing a workers' compensation claim and thereby effectively denying them the protections of the Act, while protecting all other similarly situated Texas state employees?

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The opinion of the trial court has not been selected for publication and is reproduced as Appendix B, at A-33. The opinion of the Texas Tenth Court of Appeals has been selected for publication and is reproduced as Appendix E, at A-58. The Texas Tenth Court of Appeals' order denying Richards' motion for rehearing is unreported and is reproduced as Appendix G, at A-93 . The Texas Supreme Court's letter ruling denying review is reproduced as Appendix I, at A-121.

JURISDICTION

The opinion of the Texas Tenth Court of Appeals was issued on February 11, 2004. The Texas Supreme Court denied a timely petition for review on June 25, 2004. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This Petition for Writ of Certiorari involves a challenge to sections 502.002 and 503.002 of the Texas Labor Code based on the Equal Protection Clause of the United States Constitution. Sections 502.002 and 503.002 of the Texas Labor Code make the general protections of the Texas Workers' Compensation Act applicable to employees of the Texas A&M University and University of Texas systems but fail to waive the state's sovereign immunity from suit under the anti-retaliation provisions of the Act as to these employees. TEX. LABOR CODE §§ 502.002, 503.002 (Vernon 1996). Because sections 502.002 and 503.002 deny employees of the Texas A&M University and University of Texas systems

the protection from retaliation for filing a workers' compensation claim granted to all other public and private employees covered by the Act, sections 502.002 and 503.002 violate the Equal Protection Clause of the United States Constitution, which provides, "No state shall...deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

I. The Proceedings Below

On August 25, 1998, Michael Richards filed suit against the Texas A&M University System and Texas A&M University (collectively, "Texas A&M") alleging that Texas A&M violated the anti-retaliation provisions of the Texas Workers' Compensation Act by firing him for filing a workers' compensation claim. Texas A&M moved to dismiss Richards' suit based on sovereign immunity. In his Supplementary Brief to the trial court, Richards argued that sections 502.002 and 503.002 of the Texas Labor Code violate the Equal Protection Clause of the United States Constitution, because they do not waive sovereign immunity against retaliation claims filed by employees of the Texas A&M University and University of Texas systems ("A&M and UT systems"), despite the fact that such sovereign immunity has been waived for all other public employees. Appendix A, at A-1 to A-5. Nonetheless, the trial court dismissed Richards' suit without naming any legitimate state purpose to justify section 502.002's and 503.002's discrimination. Appendix B, at A-33. In fact, the trial court acknowledged that: "There is no logical basis for the distinction." Appendix B, at A-35. Richards urged the trial

court to recon-sider its ruling based on his Equal Protection argument, but to no avail. Appendix C, at A-37. Richards noticed his appeal on May 30, 2001.

In the Texas Tenth Court of Appeals, Richards again challenged sections 502.002 and 503.002 based on the Equal Protection Clause. Appendix D, at A-49. The Court of Appeals affirmed the trial court's dismissal of the case on February 11, 2004, finding that the Texas legislature endorsed the discrimination in sections 502.002 and 503.002 for a single legitimate state purpose-to protect the public treasury. Appendix E, at A-70 to A-71. Richards moved for reconsideration of this decision citing the Equal Protection Clause, but his motion was denied. Appendix F, at A-83; Appendix G, at A-93.

Richards ultimately petitioned the Texas Supreme Court for review and once again asserted that the Equal Protection Clause invalidates section 502.002's and 503.002's discriminatory scheme. Appendix H, at A-103. The Texas Supreme Court denied review on June 25, 2004. Appendix I, at A-121. Richards has diligently preserved his Constitutional challenge to sections 502.002 and 503.002, which is squarely before this Court in this timely filed Petition for Writ of Certiorari.

II. Material Facts

Richards had been employed as a maintenance worker for Texas A&M University since 1992. During his employment, he received numerous glowing performance evaluations and congratulatory letters. In early 1998, he suffered an on-the-job back injury and filed a claim with the

Texas Workers' Compensation Commission under the Texas Workers' Compensation Act. Shortly after Richards filed this claim, Texas A&M retaliated by firing him. Texas A&M then reported Richards' back injury to his prospective employers, which frustrated his ability to seek new employment.

REASONS FOR GRANTING THE WRIT

I. Sections 502.002 and 503.002 of the Texas Labor Code Violate the Equal Protection Clause of the United States Constitution By Discriminating Against Employees of the Texas A&M and University of Texas Systems Without a Legitimate State Purpose.

It is fundamental that the Equal Protection Clause is meant to prevent arbitrary distinctions in the law. *See e.g. Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000); *Avery v. Midland County*, 390 U.S. 474, 484 (1968). When a state statute distinguishes between individuals based on non-suspect classifications, that statute is unconstitutional unless the discrimination is rationally related to a legitimate state purpose. *Board of Tr. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001). Sections 502.002 and 503.002 of the Texas Labor Code make the general protections of the Texas Workers' Compensation Act applicable to employees of the A&M and UT systems but fail to waive the state's sovereign immunity from suit under the anti-retaliation provisions of the Act, which protect employees from retaliation for filing a workers' compensation claim and are applicable to all other public and private employees covered by the Act. Protecting the state treasury has been advanced by the Texas Tenth Court of Appeals as the state purpose that justifies this dis-

crimination against Texas A&M and UT system employees. Protecting the public treasury, however, is not a legitimate state purpose, as it violates the legislatively announced public policy of the Workers' Compensation Act–ensuring that employees receive prompt remuneration for their injuries. Because there is no legitimate state purpose behind denying Texas A&M and UT system employees the protection from retaliation afforded all other public and private employees covered by the Workers' Compensation Act, sections 502.002 and 502.003 violate the Equal Protection Clause of the United States Constitution.

A. Sections 502.002 and 503.002 discriminate against employees of the A&M and UT systems by failing to adopt the anti-retaliation provisions of the Act and waive the state's sovereign immunity from retaliation claims, thereby making A&M and UT system employees the only employees covered by the Texas Workers' Compensation Act that do not enjoy the protections of the Act's anti-retaliation provisions.

As noted above, the overarching purpose of the Texas Workers' Compensation Act is to provide employees with prompt remuneration for work-related injuries. *Paradissis v. Royal Indemnity Co.*, 507 S.W.2d 526, 529 (Tex. 1974). In fact, the Act usually provides an injured employee with his exclusive remedy for work-related injuries. *Walls Reg'l Hosp. v. Bomar*, 9 S.W.3d 805, 806 (Tex. 1999) (citing TEX. LAB. CODE § 408.001(a)). The Texas legislature recognized that employers could escape workers' compensation liability and thwart the legislature's purpose by harshly retaliating against employees who file workers' compensation claims so

that employees would be discouraged from pursuing their exclusive remedy at all. *See Trico Technologies, Corp. v. Montiel*, 949 S.W.2d 308, 312 (Tex. 1997). To protect employees' exclusive remedy under the Workers' Compensation Act, the legislature enacted the Act's anti-retaliation provisions. *See id.* These provisions create a cause of action for an employee when his employer retaliates against him for filing a workers' compensation claim or participating in such a claim in other specified ways. *Id.* (citing TEX. LAB. CODE § 451.001). Both the Texas legislature and courts have acknowledged that unless employees are protected from retaliation, employers acting in bad faith could bring the workers' compensation system to its knees–a right unprotected is no right at all.

While nearly all private and public employees in Texas enjoy the protection of the Texas Workers' Compensation Act's anti-retaliation provisions, employees of the A&M and UT systems do not. By their plain language, the anti-retaliation provisions apply to all private employees covered by the Act, and the Texas legislature has adopted the anti-retaliation provisions and waived the state's sovereign immunity from retaliation claims filed by most public employees. *See* TEX. LAB. CODE §§ 451.001, 451.002, 501.002(a)(10), 504.002(a)(7), and 505.002(a)(10). The legislature, however, has not adopted the anti-retaliation provisions and waived the state's sovereign immunity from suit for employees of the A&M and UT systems. TEX. LAB. CODE §§ 502.002, 503.002. Thus, sections 502.002 and 503.002 discriminate against employees of the A&M and UT systems by treating them differently than all other private and public employees.

B. There is no legitimate state purpose for section 502.002's and 503.002's discrimination against employees of the A&M and UT systems.

Faced with section 502.002' s and 503.002's undeniable discrimination against employees of the A&M and UT systems and Richards' argument that sections 502.002 and 502.002 violate the Equal Protection Clause, Respondents were forced to articulate a legitimate state purpose for denying employees of the A&M and UT systems the protection of the anti-retaliation provisions. Respondents never asserted or articulated a state purpose, however, and the Texas Tenth Court of Appeals finally explained that the legislature's decision to deny employees of the A&M and UT systems the protection of the anti-retaliation provisions of the Workers' Compensation Act was to protect the public treasury.

Not all state purposes, however, are legitimate. Limits on state purposes are critical because the very purpose of the Equal Protection Clause is to protect individuals from arbitrary distinctions in the law. *Olech*, 528 U.S. at 564; *Avery*, 390 U.S. at 484. If courts were blind to the capriciousness of certain legislative purposes, the Equal Protection clause would be empty. Accordingly, despite its inclination to defer to state legislatures, this Court has expressly recognized some boundaries beyond which a state legislature's purpose is no longer legitimate. *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952). For example, a state purpose is not legitimate if it violates a constitutional provision or conflicts with federal law. *Id.* These limits are necessary to prevent state legislatures from creating arbitrary distinctions in the law. *See id.* Likewise, a state legislature's purpose must be illegitimate when that purpose

violates the state's legislatively announced public policy. If a state legislature had unbridled authority to single out groups of individuals and violate its own public policy as to only those individuals, the Equal Protection Clause would be powerless to prevent a state from creating arbitrary distinctions in the law.

The only reason the Texas Tenth Court of appeals articulated to justify the Texas legislature's decision to deny employees of the A&M and UT systems coverage under the anti-retaliation provisions of the Workers' Compensation Act-to save the state money-violates Texas' public policy of ensuring that employees receive prompt remuneration for their injuries. Without protection against retaliation, injured employees of the A&M and UT systems are faced with the unchecked threat that their employer will retaliate against them for filing a workers' compensation claim. These employees' legitimate fear of retaliation will create a *chilling effect*, as injured workers of these two state university systems, which number in the thousands, realize that their exclusive remedy under the Workers' Compensation Act is practically worthless. Fewer and fewer injured workers at these two state university systems will choose to jeopardize their jobs by seeking the prompt remuneration that is promised exclusively by the Act. Because the Texas legislature's apparent money-saving decision to deny A&M and UT system employees protection from retaliation for filing workers' compensation claims singles out these employees and effectively strips them of their right to prompt remuneration for their work-related injuries, it violates Texas' public policy and cannot be legitimate.

Recognizing that protecting the state treasury is not a legitimate state purpose in light of Texas' public policy of

ensuring that employees receive prompt remuneration for their injuries, the Texas Tenth Court of Appeals tried to come up with an additional rational basis for section 502.002's and 503.002's discrimination against employees of the A&M and UT systems. The Texas Tenth Court of Appeals pointed to the fact that the A&M and UT systems are the only state educational systems that are authorized to meet their workers' compensation obligations by self-insurance and explained that "the distinction between insured and self-insuring entities can constitute a valid rational basis for a distinction between them." Appendix E, at A-70. The Texas Tenth Court of Appeals' reasoning is flawed for at least two reasons.[1]

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[1]The Texas Tenth Court of Appeals also pointed to *Clark v. University of Texas Health Science Center*, 919 S.W.2d 185, 188 (Tex. App.–Eastland 1996, writ den'd), in support of its holding that sections 502.002 and 503.002 do not violate the equal protection clause. In *Clark*, another Texas appellate court considered the constitutionality of section 503.002. The plaintiff, a UT system employee, filed a retaliation action against the University of Texas after she was fired for filing a workers' compensation claim. *Id.* at 188. The trial court granted the university's motion for summary judgment on sovereign immunity grounds, and the plaintiff appealed. *Id.* Rejecting the plaintiff's argument that section 503.002 violated the Equal Protection Clause, the court reasoned that the plaintiff did not have a property interest in her employment and that the plaintiff had not identified any express agreement or statute protecting her from being discharged without a hearing. *Id.* at 188. The existence of a property right and availability of a hearing are inquiries relevant to a due process analysis, not an equal protection analysis. Nowhere in the opinion does the *Clark* court address whether section 503.002's disparate treatment of UT system employees is justified by a legitimate state purpose. Because the *Clark* court mistakenly conducted a due process analysis when evaluating whether section 503.002 violated the Equal Protection Clause, the Texas Tenth Court of Appeals erred in relying on *Clark* to support its holding.

First, the A&M and UT systems may be the only state educational systems that are authorized to meet their workers' compensation obligations by self-insurance, but they are not the only state entities that are allowed to self-insure. Indeed, all the state's political subdivisions, including the state's counties, municipalities, special districts, school districts, junior college districts, housing authorities, and community centers for mental health and mental retardation services, are authorized to meet their workers' compensation obligations by self-insurance. TEX. LAB. CODE §§ 504.001(3), 504.011. Despite the fact that the state's political subdivisions are allowed to self-insure, the Texas legislature granted the employees of the state's political subdivisions the protection of the anti-retaliation provisions of the Worker's Compensation Act. *See id.* § 504.002. Thus, the fact that the A&M and UT systems are allowed to self-insure cannot explain the disparate treatment of A&M and UT system employees.

Second, even if the A&M and UT systems were the only state entities allowed to meet their workers' compensation obligations by self-insurance, the distinction between insured and self-insured entities is illusory. While an insured entity may not directly pay judgments rendered against it, that entity will eventually pay the cost of the judgment through increased insurance premiums. At the end of the day, an insured entity is not likely to save more money than a self-insured entity, making this a distinction without a difference.

In sum, almost all private and public employees in Texas enjoy protection against retaliation for filing a workers' compensation claim. Employees of the A&M and UT systems are denied this protection because the Texas legisla-

ture declined to adopt the anti-retaliation provisions and waive the state's sovereign immunity from retaliation claims filed by employees when enacting sections 502.002 and 503.002 of the Texas Labor Code, which make the Texas Workers' Compensation Act generally applicable to employees of the A&M and UT systems. Apparently, in an effort to simply save the state money, the legislature left these employees defenseless against retaliation for filing a workers' compensation claim, effectively stripping them of their right to prompt remuneration for their work-related injuries. Because, in doing so, the legislature violated the public policy announced in the Workers' Compensation Act of providing prompt remuneration to injured workers, saving the state money cannot be a legitimate state purpose. Unsupported by any legitimate state purpose, sections 502.002 and 503.002 violate the Equal Protection Clause of the United States Constitution.

II. This Court Must More Clearly Recognize a Meaningful Limit on What Constitutes a Legitimate State Purpose.

This Court has clearly held that the Equal Protection Clause imposes limits on legitimate state purposes, but the precise contours of these limits are uncertain. This Court should clearly recognize that a state purpose is illegitimate when it violates a state's legislatively announced public policy. Without a clear limit on legitimate state purposes, state legislatures are left to speculate about how they may legitimately exercise their authority, and this legislative guessing game will lead to results that this Court cannot accept.

Here, for example, the Texas legislature's decision to deny employees of the A&M and UT systems protection

from retaliation for filing a workers' compensation claim has created a chilling effect that discourages these select employees from filing workers' compensation claims and violates the state's public policy of ensuring that employees receive prompt remuneration for their work-related injuries. This chilling effect is made even more intolerable by the fact that it has a disproportionate effect on racial minorities. Racial minorities make up a disproportionately large number of the less educated labor pool that feeds jobs requiring manual labor, and, therefore, will more frequently suffer job-related injuries. *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES, 383, 385, 406, 408 (122nd ed. 2002) (discussing minorities in manual labor and the higher injury rates related to manual labor jobs); *see also* Anne C. Case & Angus Deaton, Broken Down by Work and Sex: How Our Health Declines (July 2003) (on file with the National Bureau of Economic Research at http://papers.nber.org/papers/W9821). Because racial minorities suffer more job-related injuries, they are more likely to need the protections of the Workers' Compensation Act, and they will be disproportionately affected by any restriction of those protections.

Moreover, without a meaningful limit on what constitutes a legitimate state purpose, the Texas legislature, and other state legislatures across the country, could choose to save money in any number of other unacceptable ways. For example, the Texas legislature could choose to except the A&M and UT system employees, or any other group of state employees, from coverage under the Texas Whistleblower Act, which protects government employees from retaliation for making a Whistleblower report. TEX. GOV'T CODE § 554.001, *et seq*. Then, if an employee of the A&M or UT

systems reported illegal activity, the A&M or UT system could retaliate by firing the employee and escape any consequences. Sovereign immunity would bar this employee's suit despite the Whistleblower Act's legislatively announced public policy of preventing such retaliation against all other state employees. Again, the Texas legislature's public policy of encouraging Whistleblower reports would be thwarted, because employees of the A&M and UT systems would be hesitant to make a Whistleblower report and some reports would not be made at all. Despite the legislatively announced public policy of Texas, the A&M and UT systems would arbitrarily be left vulnerable to governmental corruption. Such a result would be no less alarming than the result of the Texas legislature's action in the case at bar. A&M and UT system employees, especially minority employees, are left vulnerable and injured with no protection against workplace retaliation.

If this Court stands idly by, what other arbitrary violations of legislatively announced public policy must the Court tolerate? Today, the Court has an opportunity to give substance to the Equal Protection Clause.

CONCLUSION

This Petition for Writ of Certiorari should be granted to ensure that state legislatures are adequately appraised of the reach of the Equal Protection Clause of the United States Constitution. Richards respectfully requests that this Court reverse the Texas Tenth Court of Appeals' panel decision. Specifically, Richards requests that this Court find that Sections 502.002 and 503.002 of the Texas Labor Code violate the Equal Protection Clause of the United States Constitution because they fail to provide protection against retaliation for filing a workers' compensation claim to employees of the A&M and UT systems, a protection granted all other private and public employees covered by the Texas Workers' Compensation Act. Richards further asks that sovereign immunity be abrogated as to his claims and that his case be remanded to the trial court with instructions for further proceedings consistent with this Court's opinion.

Respectfully submitted,

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